ficiaries thereunder and the decedent's heirs-at-law." App. 84–85. (Emphasis added.)

The basis of the Regional Solicitor's action emerges most clearly from his reliance on the legal relationship of the testator to his daughter and his failure to support her. From this he concluded that failure to provide for the daughter in the will did not meet the just and equitable "standard" that he considered the Secretary was authorized to apply in passing on an Indian will. The Regional Solicitor related the failure to support the daughter in her childhood to the absence of provision for her in the will and declared that the decedent "had an obligation to his daughter which was not discharged either during his lifetime or under the terms of his purported will. *For this reason* it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare . . . ." (Emphasis added.) While thus stressing the natural ties with Dorita High Horse, the Regional Solicitor neither challenged nor gave weight to the predicate of the Examiner's determination which was that the decedent had a close and sustained familial relationship with his niece and had resided in her home, while, in contrast, he had virtually no contact with his natural daughter.

To sustain the administrative action performed on behalf of the Secretary would, on this record, be tantamount to holding that a public officer can substitute his preference for that of an Indian testator. We need not here undertake to spell out the scope of the Secretary's power, but we cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away with the other by vesting in the Secretary

the same degree of authority to disapprove such a disposition.[12]

In reaching our conclusions it is not necessary to accept the contention of the petitioners that the Secretary's authority is narrowly limited to passing on the formal sufficiency of a document claimed to be a will. The power to make testamentary dispositions arises by statute; here we deal with a special kind of property right under allotments from the Government. The right is not absolute; the allottee is the beneficial owner while the Government is trustee. 25 U. S. C. § 348. The Indian's right to make *inter vivos* dispositions is limited and requires approval of the Secretary. The legislative history reflects the concern of the Government to protect Indians from improvident acts or exploitation by others, and comprehensive regulations govern the process of such *inter vivos* dispositions. No comparable regulations govern the right to make testamentary dispositions, and from this one might argue that the power of an Indian relating to testamentary disposition of allotted property is uninhibited. The legislative history on this score is perhaps no more or less reliable an indicator of what Congress intended than is usual when the scope of administrative discretion is in question.

Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U. S. C.

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[12] This is borne out by the Secretary's interpretation of § 373 in an arguably "improvident" testamentary disposition. As to a will naming a Caucasian as a beneficiary, a Memorandum, dated May 10, 1941, from the Solicitor's Office to the Assistant Secretary of the Interior, stated, *inter alia*,

"Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. . . ."

§ 373, we perceive nothing in the statute or its history or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not "just and equitable." The Regional Solicitor's action was based on nothing more that we can discern than his concept of equity and in our view this was not the kind or degree of discretion Congress vested in him. Cf. *Attocknie* v. *Udall*, 261 F. Supp. 876 (D. C. W. D. Okla. 1966), reversed on other grounds, 390 F. 2d 636 (C. A. 10th Cir.), cert. denied, 393 U. S. 833 (1968).

The Secretary's task is not always an easy one and perhaps is rendered more difficult by the absence of regulations giving guidelines. It is not difficult to conceive of dispositions so lacking in rational basis that the Secretary's approval could reasonably be withheld under § 373 even though the same scheme of disposition by a non-Indian of unrestricted property might pass muster in a conventional probate proceeding; on this record, however, we see no basis for the decision of the Regional Solicitor and must hold it arbitrary and capricious. There being no suggestion that the record need or could be supplemented by added factual material, the case is remanded to the Court of Appeals with directions to reinstate the judgment of the District Court.

Reversed and remanded.

MR. JUSTICE BLACK, for the reasons set forth by the Court of Appeals in this case, 407 F. 2d 394, and in *Heffelman* v. *Udall*, 378 F. 2d 109 (C. A. 10th Cir. 1967), would affirm the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 300.—October Term, 1969

Julia Tooahnippah (Goombi) et al., Petitioners, v. Walter J. Hickel, Secretary of the Interior, et al.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[April 27, 1970]

Mr. Justice Harlan, concurring.

The Court's opinion has two aspects: *First*, that the Secretary of Interior's approval or disapproval of a will disposing of restricted Indian property is subject to judicial review in a federal court. *Second*, that the Secretary's action disapproving the decedent's will in the circumstances of this case was not a valid exercise of the authority vested in him by the first proviso of 25 U. S. C. § 373.[1] I join the Court's opinion in both respects; but I deem it appropriate to amplify the reasons given by the Court for its second conclusion.

From the facts stated in the Court's opinion, I think the issue presented by the merits of this case can fairly be characterized as follows: When there is no evidence of fraud, duress or undue influence, when the decedent is of sound and disposing mind, when there is a rational basis for the decedent's disposition, and when the will meets all the technical requirements of the Secretary's regulations, does the proviso of 25 U. S. C. § 373 authorize the Secretary of the Interior or his delegate to withhold approval of an Indian will simply because he concludes, in the

[1] The text of 25 U. S. C. § 373 is quoted in relevant part in n. 3, *ante*, of the Court's opinion.

absence of any standards of general applicability, that the distribution pursuant to the will does not "most nearly achieve just and equitable treatment of the beneficiaries and the decedent's heirs-at-law"?

As the Court's opinion suggests, the petitioners would have us decide this issue by holding that the Secretary can do no more under § 373 than see to it that the various technical requirements of a valid testamentary instrument have been met. Nothing in the language of the statute would prevent such a construction, and as a way of preventing any possibility of arbitrary bureaucratic action to be undertaken in the name of paternalism there is much to commend it. I think the petitioner's claim must be rejected, however, because both the statutory network relating to the restrictions on allotted lands (of which § 373 is only a part) and the legislative history of § 373 itself, suggest the Secretary's role was not to be that limited. Nevertheless, like the Court, I conclude that the Secretary is not empowered to disapprove a will simply on the basis of an *ad hoc* determination that it is unfair. In reaching this conclusion, although the Court's reasoning and my own are parallel in significant respects, I think it helpful for purposes of analysis to elaborate in somewhat greater detail than the Court finds necessary the background of the allotment system, the legislative history of § 373, and the administrative practice of the Department of the Interior in administering Indian wills.

Section 373 relates to the testamentary disposition of what is known as restricted Indian property. This property consists primarily of beneficial interests in land allotments held in trust by the Government for individual Indians. Under the allotment system established by the Dawes Act in 1887, 24 Stat. 388, an eligible Indian was given a property interest in a specific tract of land. Although the allottee was ordinarily given possessory rights

to the land, his interest was not a fee simple. Instead, the land is held in trust by the United States for the benefit of the particular Indian, 25 U. S. C. § 348. See 25 U. S. C. § 331–358.

As long as the legal title to the land is held in trust, there are drastic restrictions on the alienability of these allotment interests.[2] In fact, 25 U. S. C. § 348 broadly states that any "conveyance" of an allotment held in trust, or any "contract" affecting that land, "shall be absolutely null and void." Moreover, it is a crime for "any person to induce any Indian to execute any contract, deed or mortgage . . . purporting to convey any land . . . held by the United States in trust for such Indian," 25 U. S. C. § 202. Under an elaborate regulatory scheme, it is only by securing the prior approval of the Secretary of the Interior that someone like George Chahsenah, the decedent here, could sell, mortgage, or give away his restricted allotments.[3] These substantial restrictions on the free alienability of allotted lands suggest that, in making the Secretary's approval a condition for the validity of a will disposing of these lands, Congress did not mean to foreclose the possibility that the Secretary might do more than simply see that the will had the requisite number of witnesses, and that the testator had the capacity to make a will.

What little legislative history there is for § 373—and there is very little—also suggests that the Secretary

[2] At the end of the trust period—not yet expired because the initial 25-year period has been extended—the allottee was to receive a fee simple interest in the land. See 25 U. S. C. § 391. Before the termination of the trust period, the Secretary is now authorized, for a particular Indian, to remove the restrictions on alienation, see 25 U. S. C. § 372; 25 CRF § 121.49.

[3] See 25 CFR §§ 121.9–121.20, 121.61, 121.18 (b), promulgated under the authority of 25 U. S. C. § 379. There are also restrictions on the allottee's ability to lease the land, see 25 U. S. C. §§ 393, 403, 415 (a); 25 CFR subchs. P and Q.

was given broader powers than a state probate judge. Section 373 has its origins in a 1910 "omnibus" Indian bill, 36 Stat. 855–863. This bill was a potpourri of provisions, for the most part unrelated to the devolution of allotted lands. However, § 2 of the bill, 36 Stat. 856, gave to the Indian, for the first time, the power to dispose of his restricted allotments by will,[4] rather than simply have the allotments descend to his heirs by the operation of law.[5] The origins of § 2 are rather obscure, and only the House Committee Report on the omnibus bill even refers to § 2 and then only in descriptive terms.[6]

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[4] Section 2, 37 Stat. 678 provided:

"That any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period, and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of Interior: *Provided, however,* that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs, and the Secretary of Interior:

"*Provided further,* that section one and two of this Act shall not apply to the State of Oklahoma." Section 2 was amended to its present form (25 U. S. C. § 373) by 37 Stat. 678 (1913).

[5] See 25 U. S. C. § 348.

[6] See H. R. Rep. No. 1135, 61st Cong., 2d Sess., at 2 (April 26, 1910); S. Rep. No. 868, 61st Cong., 2d Sess. (June 17, 1910); H. R. Rep. No. 1727, 61st Cong., 2d Sess. (June 23, 1910) (Conference Report).

The original bill, as introduced in the House by Congressman Burke and referred to the Indian Affairs Committee, contained no provision empowering Indians to make wills. See H. R. 12439, 61st Cong., 2d Sess. (introduced Dec. 6, 1909). The bill reported out of committee had such a provision, however, H. R. 24992. The House Committee Report suggested that the changes and additions to H. R. 12439 found in H. R. 24992 were made in response to recommendations made by the Secretary of the Interior in a letter of April 13, 1910. See H. R. Rep. No. 1135, *supra,* at 1. However, examination of the letter referred to in the House Committee Report, together with the revisions suggested therein, reveals neither

Even though the Committee Reports provide no indication of the Secretary's powers under the proviso of § 373, there was one exchange on the floor of the House in which Congressman Burke, the sponsor of the omnibus bill, does strongly suggest that he at least envisioned the role of the Secretary under § 373 to extend beyond simply seeing that the will met all the formal requirements of a valid testamentary instrument. This exchange between Congressman Burke and Congressman Cox of Indiana went as follows:

> "Mr. COX of Indiana. Mr. Chairman, what is the gentleman's opinion as to whether or not the proviso contained in section 2 [now 25 U. S. C. § 373] does not place the complete power of the will in the hands of the Commissioner of Indian Affairs:
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> "Mr. BURKE of South Dakota. The Commissioner of Indian Affairs and the Secretary of the Interior, of course, would not favor the provision permitting Indians to make wills unless the making of them were subject to the approval of the department.
>
> "Mr. COX of Indiana. Under the proviso as it now exists in section 2, does it not place complete power in the hands of the Secretary of the Interior and the Commissioner of Indian Affairs over the will of an Indian with absolute power to revoke the Indian's will?

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a reference to nor espousal of the idea that Indians be given testamentary capacity over restricted lands. See Letter of April 13, 1910, from Secretary of the Interior Richard A. Ballinger to Hon. Charles H. Burke with new draft of H. R. 12439.

The bill (H. R. 24992) was passed by the House as reported out of the Committee. The Senate amended the bill, deleting § 2 along with most of the remainder of the original House version. See S. Rep. No. 868, *supra*. However the Conference readopted for the most part all of the original House version, see H. R. Rep. No. 1727, *supra*, and § 2 was enacted into law in the identical form as originally passed by the House.

"Mr. BURKE of South Dakota. I think so.

"Mr. COX of Indiana. Then after all it simply imposes the entire power of making the will in the hands of the Commissioner of Indian Affairs.

"Mr. BURKE of South Dakota. I will say the purpose was this: It frequently happened—and I will speak of that in connection with sections 3 and 4 at the same time—it frequently happened an Indian has three or four children. He was allotted land at the time he had only two children, and the father and the mother have allotments and the two children who were living at the time allotments were made have allotments, but the other children have no land at all.

"Now, the Indian is just as human as a white man, and it frequently happens that he desires to have permission to give his allotment to the children who have no land, and in a case of that kind undoubtedly the Interior Department would O. K. it, whereas if it was a will giving his estate to some person who ought not to have it, then they would disapprove it.

"Mr. COX of Indiana. I suppose the purpose of this proviso is an equitable purpose, reserving in the Department of the Interior the power to compel the Indian to make a proper will——

"Mr. BURKE of South Dakota. Not compel him at all.

"Mr. COX of Indiana. Or else revoke the will if he did not make a proper will.

"Mr. BURKE of South Dakota. If the Indian makes a will, and it is not satisfactory to the commissioner and the Secretary, and I put both in to safeguard it, it will be disapproved of, and of course will be of no effect." 45 Cong. Rec. 5812.

It is primarily on the basis of the colloquy on the floor that the United States argues that we should uphold the Secretary's action in this case. According to the Government, this exchange shows that the Secretary was empowered to take "equitable considerations" into account in approving or disapproving a will. However, to affirm the administrative action in this instance, it would be necessary to hold that an otherwise valid will reflecting a rational testamentary disposition of the decedent's property can be disapproved simply because a government official decides that had he been the testator he would have written a different, and to his way of thinking, a "fairer" will.

Without attempting to define with precision the outer limits of the Secretary's authority under the proviso of § 373, I think it clear that it cannot be construed this broadly. First, it must be remembered that the primary purpose of § 373 is to give to the testator, not to the Secretary, the power to dispose of restricted property by a will. In according to the Indian testamentary capacity over restricted property Congress could have only intended to have given him the power to dispose of restricted property according to personal preference rather than the predetermined dictates of intestate succession. Such is the essence of the power to make a will. The notion that the Secretary can disapprove a will on the basis of a subjective appraisal—governed by no standards of general applicability [7]—that the disposition is unfair to a person who would otherwise inherit as a legal heir simply cuts too deeply into the primary objective of the statutory grant.

This conclusion that there must be limits to the Secretary's power under the proviso of § 373 if the primary purpose of the statute is to be accomplished, finds ex-

[7] See n. 10, *infra*.

plicit support in the Department of the Interior's own earlier construction of § 373. In response to a letter suggesting that the Secretary disapprove a will that both disinherited certain legal heirs and left part of the estate to a white person not related to the Indian decedent, the Office of the Solicitor stated in a written memorandum, after quoting the statute:

> "The right to make a will is thus conferred on the Indian not on the Secretary. Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. Such clearly would be the effect of disapproval in the present case. The naming of a non-Indian as one of the beneficiaries is not a valid objection to approval of the will in the absence of fraud or other imposition, which is clearly not present." [8]

This statement reflects what appears to have been the consistent practice of the Secretary from 1910 up to the time of the administrative action taken in this case. For, apart from the case now before us, no other instance has been called to our attention in which an Indian's will was disapproved under circumstances requiring the broad discretionary authority claimed here.[9]

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[8] Memo. Sol. I. D. May 10, 1941.

[9] At oral argument, the government attorney was asked whether there were any other instances where the Secretary had disapproved a will in circumstances such as those here. He replied, "No, I have only been able to find cases in which the wills have been approved, though it is clear that equitable considerations were taken into account." Transcript of Oral Argument, at 30. The opinion of the Regional Solicitor in the present case cites three unreported decisions to support his broad claim of the right to determine

In summary, I think the statutory framework and legislative history of § 373 do indicate that the Secretary of Interior is not foreclosed from going beyond the technical requirements in deciding whether to approve a will. A will that disinherits the natural object of the testator's bounty should be scrutinized closely. If such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertence—as might be the case if the testator married or became a parent after the will was executed—the Secretary might properly disapprove it. However, I do not think the Secretary can withhold approval

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whether the "will most nearly achieve[s] just and equitable treatment." Although there is language in these opinions claiming for the Secretary "discretionary" authority to disapprove wills, all three involved wills that disinherited minor children for whom the decedent had an obligation of support at the time of his death. Moreover, in two of the three cases the disinherited child was born after the execution of the will, thus creating the possibility that the disinheritance was inadvertent. See Estate of Oliver Maynahonah, IA-T-1 (June 30, 1966); Estate of Kosope (Richard) Maynahonah, IA-141 (Oct. 28, 1954); Estate of Frank (Oren F.) Simpkins (will disapproved Dec. 1, 1943). In this case, on the other hand, the decedent's daughter was an adult, who was married, and who was completely estranged from her father both when his will was executed and at the time of his death. On the facts shown here there is no basis for concluding that the decedent's will reflects an uninformed or irrational disposition, or one which is contrary to public policy. Any notion that the Secretary has a regular policy of disapproving wills which disinherit illegitimate offspring is belied by *Attocknie* v. *Udall*, 261 F. Supp. 876 (W. D. Okla. 1966), where the Secretary approved a will that disinherited a son born out of wedlock.

simply because he concludes it was unfair of the testator to disinherit a legal heir in circumstances where as here there is a perfectly understandable and rational basis for the testator's decision.[10]

[10] I do not mean to suggest that the Secretary might not promulgate a regulation that, like certain state statutes, provides that a testator cannot completely disinherit any of his offspring. A general standard like this would, of course, eliminate the dangers inherent in ad hoc determinations of whether the will is in some vague sense fair to an heir.